PP

v.

DATO' BALWANT SINGH

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-33-2002]
12 AUGUST 2002
[2002] CLJ JT(6)

CRIMINAL PROCEDURE: *Bail - Non-bailable offence - Murder - Discretion of court under s. 388(1) Criminal Procedure Code - Ill health of accused - Whether accused a sick and infirm person within proviso to s. 388(1) - Reasonable grounds to believe that accused was guilty of offence, whether established - Social standing and age of accused - Whether militate against him absconding*

The accused, an advocate and solicitor, was charged with the offence of murder punishable under s. 302 of the Penal Code. He was alleged to have shot one, Gobala Krishnan, resulting in death at Jalan Maarof, Bangsar in Brickfields. The accused claimed trial. The defence now applied for bail pursuant to s. 388 of the Criminal Procedure Code ('CPC').

Held:

[1] As the accused had just been produced in court pursuant to a warrant and the trial proper had yet to commence, the applicable provision was s. 388(1) CPC. The general principle underlying the section is that bail may be granted at the discretion of the court in non-bailable offences. A qualification has been made in the cases of offences punishable with death and life imprisonment whereby bail shall not be granted if there appears reasonable grounds for believing that the accused is guilty of such offences. It follows that where there are no reasonable grounds bail can be granted in such cases at the discretion of the court. (p 159 g-i)

[2] The restriction imposed in s. 388(1) CPC does not apply to the instances enumerated in the proviso thereto. Where an application for bail is made in a case punishable with, *inter alia*, death, the court must first determine whether the proviso is applicable. If it is, the ensuing matter for determination is whether the court should grant bail in the exercise of its discretion. (pp 159 i & 160 a-b)

[3] The medical report of the accused revealed that he was exposed to various complications arising from his current medical disabilities. His various medical ailments weighed with his advanced age rendered him weak, feeble and physically unsound. The report was not challenged by the prosecution. The prosecution's submission on the availability of medical facilities in the prison to treat the accused was not a relevant factor in making a determination on his health. In the circumstances, the accused was a sick and infirm person within the meaning of the proviso to s. 388(1) CPC. He was therefore not affected by the restriction placed on the section and was entitled to be enlarged on bail at the discretion of the court. (p 162 c-d)

[4] The mere fact that the accused had been charged was insufficient to show the existence of reasonable grounds for believing that the accused was guilty of the offence under s. 388(1) CPC. Also, the fact that the prosecution was instituted with the consent of the Public Prosecutor could not be construed as an indication of the existence of reasonable grounds. The granting of the bail is a judicial act and it is the court that must decide whether there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death. A mere reliance by the court on the consent of the Public Prosecutor to prosecute will result in the court subjecting itself to the will of the Public Prosecutor without applying its own mind. Any order made will not be a judicial act. (p 164 c-e)

[5] Section 388(1) CPC speaks only of the existence of reasonable grounds and not evidence. Therefore, there is no requirement to analyse the evidence that is to be tendered. The court must apply its mind to the materials made available before it. This process will preclude a detailed examination of the evidence to avoid any form of prejudice to either party. (p 165 d-e)

[6] The press statement made by the police that the accused was probably justified in firing the shot, must be read with the facts adduced by the prosecution to ascertain the existence of reasonable grounds. The finding of justification would have the clear effect of negating the existence of reasonable grounds. The press statement must be accepted at this stage in the absence of any contradiction, verification or explanation thereto. It created a doubt in the prosecution statement that the accused did not act in self-defence. Any doubt must be resolved in favour of the accused. Therefore, the prosecution failed to show the existence of reasonable grounds under s. 388(1) CPC. (p 167 e-g)

[7] It has been held that where an accused can properly raise the plea of self-defence to a charge of murder, it is a factor to be considered in granting bail. The gravity of the charge therefore does not weigh heavily against the accused. (p 169 b)

[8] No argument was advanced by the prosecution to at least indicate that the accused would abscond or tamper with witnesses if released on bail. While the prosecution did not address these issues the defence ensured that such infractions would not occur. The court did not find any reason to disagree with the defence as even the police did not consider it necessary to arrest the accused after the incident. The standing of the accused and his age also militated against the prospect of him absconding. (p 169 c-d)

[9] It may not be in the public interest to grant bail to a person facing a murder charge. However, where the other factors favour an accused the requirements of public interest can be satisfied by imposing suitable conditions in granting bail. The exceptional circumstances of this case compelled the court to conclude that the accused ought to be enlarged on bail subject to the imposition of certain conditions. (p 169 g-h)

[Accused enlarged on bail in the sum of RM500,000 with two sureties with security to be furnished, subject to conditions imposed.]

Case(s) referred to:

Che Su Daud v. PP [1978] 2 MLJ 162 ***(refd)***
Emperor v. BB Singh AIR [1943] Oudh 419 ***(refd)***
Fazal Nawaz Jung & Anor v. State of Hyderabad AIR [1952] Hyd 30 ***(refd)***
Gurcharan Singh & Ors v. State AIR [1978] SC 179 ***(refd)***
Inspector Dilbagh Singh & Ors v. State of Punjab [1986] Cri LJ 125 ***(refd)***
Juglekor v. Emperor ILR 54 All 115 ***(refd)***
Khagendra Nath Bayan & Anor v. State of Assam [1982] Cri LJ 2109 ***(refd)***
Leow Nyok Chin v. PP [1999] 1 CLJ 647 ***(refd)***
Lim Kiap Khee v. PP [1987] 2 CLJ 442; [1987] CLJ (Rep) 717 ***(refd)***
Niranjan Singh & Anor v. Prabhakar Rajaram Kharote & Ors [1980] SC 785 ***(refd)***
PP v. Abdul Rahim Hj Ahmad & Ors [1988] 3 MLJ 272 ***(refd)***
PP v. Dato' Mat [1991] 2 MLJ 186 ***(refd)***
PP v. Wee Swee Siang [1948] MLJ 114 ***(refd)***
R v. Hawken [1944] 1 WWR 408 ***(refd)***
R v. Lim Kwang Seng & Ors [1956] MLJ 178 ***(refd)***
R v. Malone [1903] St R Qd 140 ***(refd)***
R v. McDowell [1954] QWN 47 ***(refd)***
R v. Stewart [1946] 3 WWR 160 ***(refd)***
R v. Vines [1930] QWN 35 ***(refd)***

Raja Norendralal Khan v. Emperor ILR 36 Cal 166 ***(refd)***
Ram Sewak v. State of UP [1974] Cri LJ 1090 ***(refd)***
Re KS Menon [1946] MLJ 49 ***(refd)***
Sebastian v. PP [1968] 2 MLJ 214 ***(refd)***
State of Kerala v. MK Pyloth [1973] Cri LJ 869 ***(refd)***
State v. Moheboob Ali Khan & Ors AIR [1956] Bom 548 ***(refd)***
State v. Velappan Kochunny [1952] Cri LJ 1087 ***(refd)***
Yusof Mohamed v. PP [1995] 3 MLJ 66 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 388(1), (2)

Other source(s) referred to:
Mallal's Criminal Procedure, 5th edn, para 12454

For the prosecution - Tun Abdul Majid Tun Hamzah (Zauyah Be Loth Khan & Masri Mohd Daud)
For the accused - Muhammad Shafee Abdullah (Karpal Singh, Rabinder Singh, Leena Ghosh & SS Muker); M/s Shafee & Co

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul J:
In this case Dato' Balwant Singh ("the accused"), an advocate and solicitor, was charged with an offence of murder. The charge reads as follows:

> Bahawa kamu pada 7.6.2002 jam lebih kurang 4.30 petang, bertempat di Jalan Maarof, Bangsar di dalam daerah Brickfields, di dalam Wilayah Persekutuan Kuala Lumpur telah melakukan satu pembunuhan dengan menyebabkan kematian ke atas Gobala Krishnan a/l Rajamugundan, (No Kad Pengenalan: 690311-07-5247), dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

When the charge was read and explained to the accused he claimed trial. The defence then applied that the accused be enlarged on bail pursuant to s. 388 of the Criminal Procedure Code. The material parts of the section read as follows:

> 388 (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

Where a person is charged with a bailable offence, he is entitled to be released on bail as of right (see *PP v. Dato' Mat* [1991] 2 MLJ 186, *Sebastian v. PP* [1968] 2 MLJ 214, *R v. Lim Kwang Seng & Ors* [1956] MLJ 178). In the case of a non-bailable offence, bail is at the discretion of the Court (see *Lim Kiap Khee v. PP* [1987] 2 CLJ 442; [1987] CLJ (Rep) 717). Section 388 deals with the question of bail in cases of non-bailable offences. The first matter for deliberation is the proper subsection of s. 388 that is applicable to this case. Section 388(1) becomes applicable when the accused "… appears or is brought before a court …". In explaining the meaning of this phrase *Mallal's Criminal Procedure* 5th edn says at para. 12454:

The expression 'appears' is used in relation to the issue of a summons whereas the expression 'is brought before a court' is used in relation to the issue of a warrant (see *Bhramar v. State of Orissa* 1981 Cri LJ 1057; *State v. Dallu Punja* [1954] Cri LJ 1052).

The phrase thus restricts the applicability of s. 388(1) to the first production of the accused in court pursuant to a summons or warrant. The use of the phrases "… at any stage of the … trial …" and "… further inquiry …" in s. 388(2) read against the background of the meaning ascribed to s. 388(1) is a reference to a trial that has already commenced with some evidence having been adduced. It is only then that the question of a further inquiry can arise. In this case the accused has just been produced in court pursuant to a warrant. The trial proper has not commenced yet. The applicable provision would therefore be s. 388(1). The general principle underlying the section is that bail may be granted at the discretion of the court in non-bailable offences. A qualification has been made in the case of offences punishable with death and life imprisonment whereby bail shall not be granted if there appears reasonable grounds for believing that the accused is guilty of such offences. It follows that where there are no reasonable grounds bail can be granted even in such cases at the discretion of the court. The restriction that has been imposed does not apply to the

instances enumerated in the proviso to s. 388(1) with the result that bail may be granted at the discretion of the court. Where an application for bail is made in a case punishable with, *inter alia*, death the court must first determine whether the proviso is applicable. If it is the resultant matter for determination is whether the court should grant bail in the exercise of its discretion. It is superfluous to state that where the proviso applies the accused is not entitled to bail as of right but only at the discretion of the court as in the case of other non-bailable offences. Thus in *Leow Nyok Chin v. PP* [1999] 1 CLJ 647 a woman, charged with murder, was not granted bail in the exercise of the discretion of the court.

The defence contended that the medical condition of the accused brings the case within the proviso to s. 388(1). In commenting on the proviso Saikia J said in *Khagendra Nath Bayan and Anor v. State of Assam* [1982] Cri LJ 2109 at p. 2112:

> The proviso to Section 437(1) (our section 388(1)) speaks of 'any sick or infirm person'. 'Infirm', according to the *Concise Oxford Dictionary* means 'physically weak, specially, through age'. According to Webster's New Twentieth Century Dictionary, 'infirm' means weak, not strong; not firm or sound physically; feeble. Infirmity is naturally concomitant with old age. When the learned Magistrate used the expression 'too old' it could not, therefore, be said that the case did not fall under the proviso. The sickness envisaged is such as results in infirmity of the person.

In support of its argument the defence tendered a medical report on the accused. The material parts of the report read as follows:

> This is to state that I have been looking after Dato' Balwant Singh's health since 1967.
>
> Though my speciality is paediatrics, I have served in the government as a consultant physician in several states in the country. I was consultant physician in Terengganu for about 4 months, state physician in Negeri Sembilan for one year and covered the duties of the state physician on and off in Kelantan and elsewhere.
>
> Dato' Balwant Singh is over 80 years old. He is very fragile. He is afflicted by several serious diseases:
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> 1. Atherosclerotic Heart Disease
> 2. High Blood Pressure
> 3. Severe and brittle Diabetes Mellitus
> 4. Diabetic neuropathy
> 5. Severe back bone disease
> 6. Piles

He has severe heart disease. He has had two By-pass operations – one in Adelaide in Australia and the second at the National Heart Centre in Kuala Lumpur. He is currently on several medications for his heart condition. Recently he has again begun to get angina symptoms on moderate activity.

He has high blood pressure and is on medication for this.

He has severe back problems due to degenerative changes in the bones of the back. He suffered much pain and suffering for years. Recently he underwent major surgery at the Selangor Medical Centre for this and has had some relief.

He is suffering from piles, which gives him problems every now and then.

He had on and off bleeding from the intestines. Polyps were discovered and had to be removed at the Kuala Lumpur General Hospital.

He has had diabetes mellitus for about 35 years. He was on tablets for many years but has had to go on injections of insulin. About a year ago, his diabetes went out of control and became very unstable and brittle. He had to be admitted to General Hospital Kuala Lumpur several times for stabilisation. Diabetic neuropathy has rendered his feet with reduced sensation. He is unable to feel normal pain in his feet. Such conditions lead to burns and other injuries to the feet. These injuries are very difficult to heal and often end up in amputations.

His diabetes has required him to be put on special diet. The calories have to be correct and his meals have to be small and frequent and of the correct balance.

Due to age and diabetes his general body resistance is very poor. He tends to get infections very readily from the slightest provocation. Yesterday he rang me up at 10pm because he was having chills and was shaking uncontrollably. I examined him and found that he had temperature. I took him to my clinic at 10.30pm and examined his urine and confirmed that he had Pyelonephritis, that is, infection of the kidneys. Such infections are not uncommon in patients with diabetes. I had to inject him with antibiotic and give him medication to alkalanise his urine. Today he is afebrile and without any chills. He will have to take medication for about two weeks.

Dato' Balwant Singh suffers from several serious medical conditions which need to be monitored regularly. His diet has to be carefully controlled. He takes over ten different tablets to allow him to live.

The report enumerates and describes the serious diseases that the accused is afflicted with. It reveals that he is a known heart patient with a history of two by-pass operations. Of late he has developed angina on moderate activity. He is on medication for his heart ailments. This, coupled with his hypertension and diabetes, will make the possibility of him having a heart

attack very high. His diabetes mellitus is very long standing. He now has diabetic neuropathy which has resulted in reduced sensation in his feet and an inability to feel normal pain in the feet. This condition is not safe as it may lead to ulcers in the feet which may in turn result in gangrene and amputation. His diabetes, age and poor body resistance have predisposed him to frequent infections. Lately he has developed Pyelonephritis which can progress to severe kidney failure. He has severe back problems due to degenerative changes in the bones of the back. He had surgery for this and had some relief. The medical report reveals that the accused is exposed to various complications arising from his current medical disabilities. They can be life threatening. He is thus a fragile person as stated in the medical report. His various medical ailments weighed with his advanced age render him weak, feeble and physically not sound. The report was not challenged by the prosecution. The prosecution did submit on the availability of medical facilities in the prison to treat the accused. But that is not a relevant factor in making a determination on his health. In the circumstances it is my view that the accused is a sick and infirm person within the meaning of the proviso to s. 388(1). He is therefore not affected by the restriction placed on s. 388(1) and is entitled to be enlarged on bail at the discretion of the court.

Be that as it may, I shall also consider the applicability of the enacting part of s. 388(1) to the facts of this case. This is also a necessary inquiry to be made to facilitate the exercise of the discretion in the granting of bail. The determination of the existence of reasonable grounds can be done with ease if the deposition recorded at a preliminary inquiry, as in the past, is before the court. In the absence of such a record now I considered it necessary to first determine the nature of material that must be made available to the court in order to make a decision. In this regard I refer to *Che Su binti Daud v. PP* [1978] 2 MLJ 162 where Gunn Chit Tuan J (as he then was) said at p. 163:

> But apart from stating that the fact that the accused/applicant has been charged showing that there was sufficient evidence against her, the learned Deputy Public Prosecutor was reluctant or unable to inform the court of the nature of the evidence in support of the charge and considered that it was not right for the prosecution to disclose any evidence to the court at that stage. I realised that at an early stage it was not possible to have evidence from the prosecution to establish the guilt of the accused beyond reasonable doubt. (See *Keshu Vasudeo Kortikar v. Emperor* AIR [1933] Bom 492). But since an application for bail had been made at an early stage the prosecution should satisfy the court that it would be able to produce good *prima facie* evidence in support of the charge.

As Govinda Pillai J said in *State v. Velappan Kochunny* [1952] Cri LJ 1087:

> When an application for bail is made in the initial stage of the case, the Magistrate may expect the prosecution to satisfy him that there is a genuine case, and that it will be able to produce *'prima facie'* evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt *vide Keshav Vasudeo v Emperor* AIR [1933] Bom 492. As pointed out in *Emperor v. Muhammad Panah* 36 Cri LJ 811 (Sind) the section speaks only of reasonable grounds and not evidence.

However, as Krishna Iyer J said in *Niranjan Singh and Anor v. Prabhakar Rajaram Kharote and Others* AIR [1980] SC 785 at pp. 786-787:

> Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself.

Thus the court is not required to go into the details of the evidence at this stage (see *Fazal Nawaz Jung and Anor v. State of Hyderabad* AIR [1952] Hyd 30). The court must therefore decide the existence of the reasonable grounds on the materials before it and not what may be unfolded later. As Hari Swarup J said in *Ram Sewak v. State of UP* [1974] Cri LJ 1090 at p. 1091:

> The test for determining whether a *prima facie* case exists or not at a time prior to the stage of evidence, is not that if the prosecution witnesses are shattered in cross-examination or the witnesses named in the FIR do not support the story when the trial proceeds, the case will end in acquittal: but, that if at the trial the witnesses depose as averred in the first information report, will the guilt of the accused stand proved beyond reasonable doubt. The probability or improbability of the prosecution version is to be judged on the basis of the material available to Court on the date the question of bail is considered and not on the basis of what might appear through cross-examination of witnesses or, from defence evidence.

It follows that objections as to the admissibility of evidence are pre-mature at this stage. As Medeley J said in *Emperor v. BB Singh* AIR [1943] Oudh 419 at p. 422:

> Learned counsel for Mr BB Singh has argued that the facts proved in the case cannot constitute an offence punishable with death or transportation for life, but at the most one under s. 304, Penal Code, Part II. Investigation has not yet finished and it is impossible to say with certainty what facts

> will be proved in the case. A similar objection has been taken by counsel about some of the material which I have made use of for the purposes of this order. He has argued that admissible evidence will not be available to prove it. It is, however, impossible for me to know what evidence will be produced at the trial and what arguments may be used as to its admissibility. In my opinion, at this stage of the investigation, any such objections are premature. I have to make use of the material before me in its present condition and not as it will appear after evidence has been taken in Court.

What is therefore required is the satisfaction of the court of the existence of evidence to support the charge that has been preferred. The court is required to analyse and apply its mind to the evidence that is available (see *State v. Moheboob Ali Khan and Others* AIR [1956] Bom 548). Thus the mere fact that the accused has been charged, as contended by the learned Deputy Public Prosecutor, is insufficient to show the existence of reasonable grounds. The further argument advanced by the prosecution that the fact that the prosecution was instituted with the consent of the Public Prosecutor must be construed as an indication of the existence of reasonable grounds cannot also be sustained. The granting of bail is a judicial act and it is the court that must decide whether there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death for which purpose it is necessary to have the facts to base on opinion (see *Re K S Menon* [1946] MLJ 49). A mere reliance by the court on the consent to prosecute will result in the court subjecting itself to the will of the Public Prosecutor without applying its own mind. Any order made will not be a judicial act. In this regard reference is made to *Yusof bin Mohamed v. PP* [1995] 3 MLJ 66 where Malik Ishak J said at p. 73:

> But one thing is certain. It is this. That the grant, refusal or cancellation of bail is a judicial act and has to be performed with judicial care after giving serious consideration to the interests of all the parties concerned.

Similarly in *State of Kerala v. M K Pyloth* [1973] Cri LJ 869 Bhaskaran J said at p. 870:

> However, whether there are reasonable grounds or not for believing that he has been guilty of an offence punishable with death or imprisonment for life is a matter to be decided judiciously by the Court. Merely because it is stated by the police that the person before the Court is an accused in a case falling under Section 302 IPC the Court will not be justified in at once refusing bail to that person. The Court has both a right and a duty to satisfy itself whether there are reasonable grounds for believing that the accused has involved himself in an offence punishable with death or imprisonment for life. If the Court chooses to accept the police report without applying its mind and examining the materials placed before it, the Court will be failing to discharge its statutory duty under the Code.

I also refer to *Inspector Dilbagh Singh and Others v. State of Punjab* [1986] Cri LJ 125 where Punchhi J said at p. 127:

> The argument, if accepted, would lead to the converse result that whenever the Public Prosecutor opposes the application for bail the accused persons must be denied bail. In other words, if the interpretation of the Public Prosecutor is accepted, this Court would be pledging its discretion to the will of the Public Prosecutor. That cannot be done in any event: that was not the intention of the legislature. Whether the Public Prosecutor opposes or does not oppose an application, the Court has yet to satisfy that there are reasonable grounds for believing that the applicant is not guilty of a scheduled offence and that he is not likely to commit any offence while on bail.

Accordingly, I advised the prosecution that something in the nature of an opening address may suffice. This must, of course, refer to the evidence to be adduced in support of the assertions made in the statement. This will be sufficient for the court to ascertain whether the prosecution will be able to produce *prima facie* evidence in support of the charge. As the section speaks only of the existence of reasonable grounds and not evidence there is no requirement to analyse the evidence that is to be tendered. The court must apply its mind to the materials made available. This process will preclude a detailed examination of the evidence to avoid any form of prejudice to either party.

The learned Deputy Public Prosecutor then made a narration of the facts in the following terms:

> OKT telah dituduh oleh Pendakwa Raya di bawah Sek 302 KK. Pihak pendakwaan mempunyai keterangan-keterangan yang mencukupi untuk membuktikan pertuduhan tersebut melalui keterangan saksi-saksi bebas dan eye witnesses dan juga melalui keterangan dokumen untuk membuktikan OKT melakukan kesalahan ini. Saksi-saksi akan dipanggil untuk membuktikan bahawa pada 7.6.2002 iaitu semasa saksi Corporal Amran sedang bertugas di Pejabat Pertanyaan, Balai Polis Travers beliau telah menerima panggilan telefon daripada seorang lelaki memberitahu satu lelaki India telah ditembak oleh seorang lelaki Sikh di hadapan Stesyen Minyak Petronas, Jalan Maarof. Dan ini dijadikan Pantai Report 4503/02. Pihak pendakwaan mempunyai saksi bebas, eye witnesses yang melihat bagaimana kejadian berlaku dan melihat OKT menembak simati. Saksi-saksi akan dipanggil untuk memberi keterangan bahawa mereka melihat OKT dan simati bertengkar dan melihat simati memegang sebatang kayu yang kecil dan kemudian melihat OKT melepaskan satu tembakan ke udara. Kemudian mereka melihat simati berundur beberapa langkah tetapi masih berada di tempat tersebut dan OKT mengacu pistol ke arah simati dan melepaskan satu lagi das tembakan ke arah simati. Simati berpaling menuju ke

motosikalnya tetapi rebah sebaik sahaja sampai di motosikal. Keterangan akan dikemukakan untuk buktikan simati mati di tempat kejadian. Laporan bedah-siasat sahkan simati mati sebab kematian adalah firearm injury to aorta and right and left lung. Keterangan juga akan dikemukakan bahawa injuries tersebut disebabkan oleh peluru yang dikeluarkan oleh pistol OKT. Pihak pendakwaan juga akan kemukakan keterangan melalui saksi-saksi bebas dan eye witnesses bahawa mereka tidak melihat simati memukul OKT pada bila-bila masa. Tambahan pula pada tempat kejadian terdapat ramai orang dan lalulintas sesak. Pihak pendakwaan juga akan buktikan OKT tidak ada sebab untuk menembak simati. OKT telah menembak simati dengan mempunyai niat untuk membunuh simati dan bukan untuk pertahankan diri.

The learned Deputy Public Prosecutor made it clear that what she had outlined is only a statement to show that there are reasonable grounds for believing that the accused is guilty of the offence and that it is not to be construed as the opening address to be tendered when the trial begins.

The facts as enumerated show that there are reasonable grounds for believing that the accused committed the offence and that he did not fire the shot in self-defence. The facts are thus capable of showing the existence of reasonable grounds for believing that the accused is guilty of the offence he has been charged with. When the defence attempted to go into the possible defences of the accused I ruled that it is irregular to consider them at this stage. Learned counsel agreed with grace. The defence then produced a newspaper report appearing in the Malay Mail of Wednesday, 12 June 2002. It was issued by the police. The material parts of it read as follows:

OUR investigations show there is justification.

Depending on the situation, if there is an offence we will arrest the culprit.

The fact that if there is an offence the police will arrest the accused is qualified by the conclusion that the investigation shows that the accused was justified in firing the shot. As this view was expressed by the police, the very agency that investigated into the incident, it must be read with the facts adduced by the prosecution to ascertain the existence of reasonable grounds. Since the right of private defence can be established in the course of the prosecution case itself it is a relevant matter for consideration at this stage. As the finding of justification will result in there being no offence at all it will have the clear effect of negating the existence of reasonable grounds as narrated by the prosecution. Accordingly, I asked the learned Deputy Public Prosecutor to explain the press statement. This is what she said:

> At that time investigation was not completed yet. At that stage IP was not referred to AG's Chambers. The statement of Musa is only in the papers. It has to be verified. … … … The newspaper report cannot be accepted as the truth.

As I said earlier the court is not concerned with rules of admissibility at this stage. In any event, if I were to accede to the argument of the learned Deputy Public Prosecutor it would also mean that I cannot accept the facts given by her on the ground that they have not been proved. That will leave her with no material to show the existence of reasonable grounds. Her further argument that when the press statement was made the investigation was not completed yet may not be sustainable as the police statement says that it is the investigation that shows justification. Surely it must be a reference to the full investigation. However, it might well be so that the police statement was made before completion of the investigation in view of the proximity of the date of the statement to the date of incident. Thus I agreed with the learned Deputy Public Prosecutor that the matter requires to be verified and, for that purpose, adjourned the matter for continued hearing to the following day.

At the resumed hearing on the following day the prosecution made absolutely no reference to the press statement which was the focus of attention the previous day and which the learned Deputy Public Prosecutor wanted to be verified. If in fact the press statement was made prior to completion of police investigation it could have been established with ease by reference to statements recorded subsequent to the making of the statement. That was not done. In the absence of any contradiction, verification or explanation of the press statement it must be accepted at this stage. It is supported by the fact that the accused fired a warning shot. The press statement thus creates a doubt in the prosecution statement that the accused did not act in self-defence. It is an established principle of criminal law that any doubt that may arise must be resolved in favour of the accused. I was therefore unable to say with confidence that the facts enumerated by the prosecution show that there are reasonable grounds to believe that the accused is guilty of the offence. This led me to hold that the prosecution had failed to show the existence of reasonable grounds. This must not be taken to cast any aspersion on the Public Prosecutor's decision to prosecute the accused for murder. He had the benefit of the full and complete investigation papers. I was not in such an advantageous position. I had to make a decision on the material made available to me. I must also make it manifestly clear that my finding must not be taken to mean that it is an indication, directly or indirectly or expressly or

implicitly, of the rulings to be made as the trial unfolds itself. This finding again means that the accused is entitled to be released at the discretion of the court.

The factors to be taken into account in the consideration of a bail application are well established. In *PP v. Wee Swee Siang* [1948] MLJ 114 Callow J identified the following factors:

(a) whether there was or was not reasonable grounds for believing the accused guilty of the offence;

(b) the nature and gravity of the offence charged;

(c) the severity and degree of punishment that might follow;

(d) the danger of the accused absconding if released on bail;

(e) his character, means and standing;

(f) the danger of the offence being continued or repeated;

(g) the danger of witnesses being tampered with;

(h) opportunity to the accused to prepare his defence; and

(i) the long period of detention of the accused and probability of further period of delay.

The list is not exhaustive. Thus it has been held that the larger interest of the public and the country as a whole is also a factor to be considered (see *Yusof bin Mohamed v. PP* [1995] 3 MLJ 66). In my opinion the health of the accused is also a factor that can be considered. The seriousness of the offence certainly cannot be the dominant consideration (see *State of Kerala v. M K Pyloth* [1973] Cri LJ 869). The fact that there are no reasonable grounds for believing that an accused is guilty of the offence charged with will certainly be in his favour. In *Gurcharan Singh and Others v. State* AIR [1978] SC 179 Goswami J said at p. 187:

> We may repeat the two paramount considerations, *viz* likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a court of justice. It is essential that due and proper weight should be bestowed on these two factors apart from others.

In the final analysis the discretion must be exercised upon a consideration of the cumulative effect of all the factors (see *Che Su binti Daud v. PP* [1978] 2 MLJ 162).

There can be no dispute that the charge faced by the accused is a very grave one. This, however, must be balanced against the failure by the prosecution to show that there are reasonable grounds for believing that the accused committed the offence that he has been charged with. This is the result of the press statement by the police to the effect that the act of the accused is justified. This favours the grant of bail (see *R v. Hawken* [1944] 1 WWR 408). It has also been held that where an accused could properly raise the plea of self-defence to a charge of murder it is a factor to be considered in granting him bail (see *R v. Stewart* [1946] 3 WWR 160). The gravity of the charge therefore does not weigh heavily against the accused. No argument was advanced by the prosecution to at least indicate that the accused would abscond or tamper with witnesses if released on bail. As I noted earlier these are matters of paramount consideration. This is because the very object of granting bail is to ensure that the accused will attend at the trial and that, while on bail, he will not interfere with the administration of justice by tampering with witnesses. While the prosecution did not address these issues the defence ensured that such infractions will not occur. I find no reason to disagree as even the police did not consider it necessary to arrest the accused after the incident. The standing of the accused and his age also militate against the prospect of him absconding. I was therefore unable to hold that the accused would abscond or tamper with witnesses if released on bail. The medical report tendered by the defence shows that the accused who is aged 81 is in very poor health and needs to be monitored regularly. Though medical facilities are available in the prison it may be preferable for the accused to be in a place where he can have access to immediate medical treatment. It cannot be said that the accused would repeat the offence if released on bail. The social status of a person, as in the case of the accused, also assumes relevance along with the other circumstances of the case (see *Juglekor v. Emperor* ILR 54 All 115 (FB), *Raja Norendralal Khan v. Emperor* ILR 36 Cal 166). It may not be in the public interest to grant bail to a person facing a murder charge. However, where the other factors favour an accused the requirements of public interest can be satisfied by imposing suitable conditions in granting bail. It is settled law that a court may impose conditions in granting bail (see *PP v. Dato' Mat* [1991] 2 MLJ 186, *PP v. Abdul Rahim bin Hj Ahmad & Ors* [1988] 3 MLJ 272). The exceptional circumstances of this case compelled me to conclude that the accused ought to be enlarged on bail subject to the imposition of certain conditions. I pause to add that the granting of bail in an offence of murder is not unprecedented. It has been done, for example, in the Indian case of *Niranjan Singh and Anor v. Prabhakar Rajaram Kharote and Others* AIR [1980] SC 785, in the Australian cases of *R v. Malone* [1903] St R Qd

140, *R v. Vines* [1930] QWN 35 and *R v. McDowell* [1954] QWN 47 and in the Canadian cases of *R v. Stewart* [1946] 3 WWR 160 and *R v. Hawken* [1944] 1 WWR 408.

In the upshot I ordered that the accused be enlarged on bail in the sum of RM500,000 with two sureties with security to be furnished. It is subject to acceptance of the following conditions:

(i) The accused is to surrender his firearm and the licence relating thereto to the police immediately;

(ii) All passports to be surrendered to the court;

(iii) The accused is to report to the police once in two weeks;

(iv) The accused is to remain indoors from the hours of 6pm to 8am;

(v) The accused is not to be present at any open public place or attend any public functions save for religious and family activities;

(vi) The accused is not to leave Kuala Lumpur and Petaling Jaya without leave of court;

(vii) The accused is to cease his legal practice within a period of one week from 8 August 2002.